

June 20, 2017

Citizen Suit Coordinator
Department of Justice, ENRD
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
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JUN 29 2017

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

Sent via Certified Mail and Electronic Mail

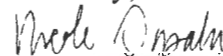
Re: First Amendment to Consent Decree – *San Francisco Baykeeper v. City of San Jose, et al.* (Civil Case No. 15-CV-00642-BLF)

Dear Citizen Suit Coordinator and Administrator Session:

Please find enclosed a copy of a [Proposed] First Amendment to Consent Decree between San Francisco Baykeeper ("Baykeeper") and the City of San Jose (*San Francisco Baykeeper v. City of San Jose, et al.*, Civil Case No. 15-cv-00642-BLF). The [Proposed] First Amendment to Consent Decree amends the agreement to: (1) clarify specifications for the maintenance of trash capture devices; (2) extend the deadline for San Jose to develop its Comprehensive Load Reduction Plan ("CLRP") and Reasonable Assurance Analysis ("RAA"); and (3) direct remaining environmental mitigation funds to Keep Coyote Creek Beautiful and South Bay Clean Creeks Coalition.

If you have any questions or comments concerning the terms of the Consent Decree, please contact me at (510) 735-9700 x110 or nicole@baykeeper.org.

Sincerely,



Nicole C. Sasaki
Associate Attorney
San Francisco Baykeeper

Enclosure



Notice to DOJ re San Jose

June 20, 2017

Page 2 of 2

Cc:

Alexis Strauss, Acting Regional Administrator

EPA Region 9

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San Francisco, California 94105

Cc via Electronic Mail:

Nora Frimann, Deputy City Attorney, City of San Jose

Email: nora.frimann@sanjoseca.gov

Daniel Cooper, Lawyers for Clean Water

Email: daniel@lawyersforcleanwater.com

1 APPROVED AS TO FORM:

2
3 Date: 6-15-17

4 By: 
NORA FRIMANN
Assistant City Attorney

5
6 SAN FRANCISCO BAYKEEPER

7 Date: 5/26/17

8 By: 
SEJAL CHOKSI-CHUGH
Executive Director

9
10 APPROVED AS TO FORM:

11 Date: 5/26/17

12 By: 
ERICA MAHARG
Managing Attorney

13
14
15 IT IS SO ORDERED

16 Dated: _____

17 By: _____
Honorable Beth Labson Freeman
District Judge of the
United States District Court for the
Northern District of California

1 67.1 a. Within thirty (30) days of execution of this First Amendment to the Consent
2 Decree, each Grantee must provide a letter to the United States Department of Justice and
3 the Parties confirming the following: (i) that it is a non-profit corporation organized under
4 Section 501(c)(3) of the United States Internal Revenue Code or that it will acquire Section
5 501(c)(3) status by the time it receives any environmental mitigation funds pursuant to
6 Paragraph 67; (ii) it has read the Consent Decree; (iii) it agrees to use the money provided
7 for under this Consent Decree for a Project or Projects as defined in Paragraph 67; and
8 (iv) that it will not use any funds received under this Consent Decree for political lobbying
9 activities or other unauthorized activities.

10 b. Each Grantee must also provide a letter to U.S. Department of Justice and
11 the Parties annually summarizing the activities conducted and the Projects to which the
12 money was directed, and confirming consistency with Consent Decree requirements. The
13 letters must be submitted on or before May 30th each Year for which the Grantees
14 received funding in whole or in part as a result of the Consent Decree.

15 4. Baykeeper will submit this First Amendment to U.S. Department of Justice and the
16 U.S. Environmental Protection Agency within three (3) business days of the Parties'
17 execution of this First Amendment for agency review consistent with 40 C.F.R. § 135.5.
18 After the U.S. Department of Justice has notified the Court or the Parties that it does not
19 object to the First Amendment or the 45-day agency review period has expired, whichever
20 is earlier, Plaintiff shall promptly request that the District Court enter this First Amendment.

21 5. The Effective Date of the First Amendment will be the date on which DOJ approves
22 the First Amendment.

23 6. All other terms and conditions in the Consent Decree not modified by this First
24 Amendment will remain in full force and effect.

25
26 CITY OF SAN JOSE

27 Date: 6-15-17

28 By: 

RICHARD DOYLE
City Attorney

1 impacts of municipal stormwater pollution and/or trash in and along Coyote Creek and the
2 Guadalupe River or tributaries within San Jose. By July 1, 2017 or within 10 business
3 days of the Effective Date of the First Amendment, whichever date is later, and by July 1
4 for three years thereafter, San José will submit payment of one hundred thousand dollars
5 (\$100,000) to South Bay Clean Creeks Coalition addressed to PO Box 7633 San Jose, CA
6 95150. Keep Coyote Creek Beautiful has submitted the paperwork to the Internal Revenue
7 Service to incorporate as a not-for-profit corporation under section 501(c)(3) of the Internal
8 Revenue Code. By July 1, 2017 or within 10 business days of Keep Coyote Creek
9 Beautiful notifying San Jose and Baykeeper that it has received its 501(c)(3) status,
10 whichever date is later, and by July 1 for three years thereafter, San Jose will submit
11 payment of one hundred thousand dollars (\$100,000) to Keep Coyote Creek Beautiful
12 addressed to 132 Devonshire Blvd, San Carlos, CA 94070.

13 a. Projects must be based on the following criteria:

- 14 i. Mitigation of the impacts of trash and bacteria discharges in Coyote
15 Creek or the Guadalupe River;
- 16 ii. Improvement of water quality in Coyote Creek or the Guadalupe River;
17 or
- 18 iii. Habitat restoration in and along Coyote Creek or the Guadalupe River.

19 b. In the event that either of the Grantees is unable to or declines to conduct a
20 Project or Projects during the first five (5) years of the Consent Decree, the Parties will
21 meet and confer and mutually select an alternative Grantee(s).

22 c. In accordance with a separate agreement between the City and San Jose
23 Parks Foundation, San Jose Parks Foundation will return any unencumbered funds to San
24 Jose. San Jose will allocate one-half of any funds returned to Keep Coyote Creek
25 Beautiful and the other half to South Bay Clean Creeks Coalition along with the 2017-2018
26 allocation in paragraph 67, above, or as soon as possible after receiving the funds from the
27 San Jose Parks Foundation.

28 2. Paragraph 67.1 is added to the Consent Decree to read in full as follows:

1 insert, requires removal of accumulated trash, San Jose will inspect the device again
2 within thirty (30) days after the accumulated trash was removed. If the device is plugged or
3 is greater than fifty (50) percent full of accumulated trash at that time, San Jose will
4 remove the accumulated trash from CPS device, or other catch basin insert, again and
5 develop a device-specific inspection and maintenance plan to ensure the device is neither
6 plugged nor more than half full of trash at the next maintenance event. San Jose will
7 maintain Hydrodynamic Separators or other high flow capacity devices that meet the
8 definition of Full Trash Capture Systems (collectively, "HDS devices") according to
9 manufacturer recommendations. If maintenance of an HDS device in accordance with
10 manufacturer recommendations is insufficient to ensure that the device is working properly
11 at all times, San Jose will develop and implement a device-specific inspection and
12 maintenance plan that increases the frequency of maintenance based on the
13 manufacturer recommendations to ensure the device works properly at all times.

14 2. Paragraph 53.a of the Consent Decree will be amended in full as follows: San Jose
15 shall contract with one or more qualified consultant or consultants, or identify qualified
16 internal staff, to develop the CLRP and RAA by November 30, 2017.

17 3. Paragraph 67 of the Consent Decree will be amended in full as follows:

18 67. Environmental Mitigation Project: In lieu of civil penalties and to mitigate past
19 environmental harms allegedly resulting from the allegations in the Complaint, San José
20 agrees to fund and implement one or more environmental mitigation project(s) for the five
21 (5) years following enactment of this Consent Decree in the amount of two hundred
22 thousand dollars (\$200,000) per year. San Jose sent the San Jose Parks Foundation
23 \$200,000 on or around July 1, 2016, to give grants to fund projects that mitigate the
24 impacts of municipal stormwater pollution and/or trash on Coyote Creek and the
25 Guadalupe River. Commencing in the City's fiscal year 2017/18, the \$200,000 annual
26 payments due for the remaining four years of this obligation are to be split evenly between
27 Keep Coyote Creek Beautiful and the South Bay Clean Creeks Coalition (singularly
28 "Grantee" and collectively, the "Grantees"), to be used for projects that mitigate the

1 **FIRST AMENDMENT TO THE CONSENT DECREE**

2 This First Amendment to the Consent Decree ("First Amendment") is entered into by
3 and between San Francisco Baykeeper ("Baykeeper") and the City of San Jose ("San
4 Jose"), a municipal corporation, for the purpose of modifying certain terms in the Consent
5 Decree. All defined terms in the Consent Decree will have the same meaning in this First
6 Amendment unless otherwise modified below.

7 **RECITALS**

8 **WHEREAS**, to resolve a lawsuit brought by Baykeeper against San Jose under the
9 Federal Water Pollution Control Act, 33 U.S.C. section 1251 et seq., the Parties agreed,
10 without adjudication of the lawsuit or admission by San Jose of any alleged violation or
11 wrongdoing, to resolve the lawsuit through a settlement to avoid the costs and uncertainties
12 of further litigation;

13 **WHEREAS**, the United States District Court approved that certain Consent Decree
14 between Baykeeper and San Jose on August 11, 2016;

15 **WHEREAS**, the Consent Decree obligates San Jose to contribute \$200,000 per
16 year over a period of five years for an environmental mitigation project;

17 **WHEREAS**, the Parties agreed that the San Jose Parks Foundation would
18 administer the environmental mitigation project;

19 **WHEREAS**, the Parties are not satisfied with the framework for distributing the
20 environmental mitigation project funds and wish to provide for direct funding from San Jose
21 to Grantees.

22 **NOW THEREFORE, IT IS HEREBY STIPULATED BETWEEN THE PARTIES AND**
23 **ADJUDGED, ORDERED, AND DECREED BY THE COURT AS FOLLOWS:**

24 1. Paragraph 29 of the Consent Decree will be amended in full as follows:

25 29. Maintenance of Connector Pipe Screens or other catch basin inserts that meet the
26 definition of Full Trash Capture Systems (collectively, "CPS devices") shall include visual
27 inspection and removal of all accumulated trash when the device is plugged or is greater
28 than fifty (50) percent full of accumulated trash. If a CPS device, or other catch basin

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11 CITY OF SAN JOSE

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28 Attorneys for Plaintiff
SAN FRANCISCO BAYKEEPER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER, a
California non-profit corporation,

Plaintiff

v.

CITY OF SAN JOSE, a municipality, et al.,

Defendants.

Case Number: 15:cv-00642-BLF

**[PROPOSED] FIRST AMENDMENT
TO CONSENT DECREE**